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No. 05-348

In the
Supreme Court of the United States

SAMANTHA J. COMFORT, on behalf of her Minor Child, Elizabeth Neumyer, et al.,

Petitioners,

v.

LYNN SCHOOL COMMITTEE, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The City of Lynn, Massachusetts, permits school choice within its public schools, but restricts participation on the basis of race. Under Lynn's plan, a transfer request will be denied if the transfer negatively affects the level of racial balance at the sending or receiving school. Racial balance is measured in terms of proportional representation to the system-wide minority student population. The only characteristic considered in granting or denying school choice requests is the race of the child. Lynn's plan does not include any individualized consideration.

The questions presented are:

1. Whether, in public elementary and secondary schools, achieving racial diversity is a compelling governmental interest sufficient to permit race-based restrictions on school assignments.

2. Whether a student assignment plan that mechanically and inflexibly restricts assignments based on the classifications "minority" and "non-minority" meets the Fourteenth Amendment's requirement of narrow tailoring.

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Joint Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf (last visited Oct. 4, 2005) 15

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Mass. Dep't of Educ., Lynn Pub. Sch. Dist. Enrollment/Indicators, Enrollment by Race/Ethnicity (2004-05), *at* http://profiles.doe.mass.edu/home.asp?orgcode=01630000&view=enr (last visited Oct. 17, 2005) 4

Nat'l Ctr. for Educ. Statistics, *Information on Public Schools and School Districts in the United States*, CCD Quick Facts, *at* http://nces.ed.gov/ccd/quickfacts.asp (last visited Oct. 17, 2005) 2-3

Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004), *available at* http://www.ed.gov/about/offices/list/ocr/raceneutral.html (overview) and http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html (report) (last visited Oct. 25, 2005) 19

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF), the Center for Equal Opportunity (CEO), and the American Civil Rights Institute (ACRI) submit this brief amicus curiae in support of Petitioners Samantha J. Comfort, et al.[1] Letters of consent to file this brief were obtained from all parties and have been lodged with the clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. PLF participated as amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). PLF participated as amicus curiae in this case before the First Circuit Court of Appeals.

CEO and ACRI are nonprofit research, education, and public advocacy organizations. Amici devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. Amici have participated as

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity in noncompetitive K-12 public schools may be a compelling governmental interest sufficient to justify discriminating against children.[2] Specifically, Amici will show that the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Gratz*, 539 U.S. 244, and *Grutter*, 539 U.S. 306, simply has no counterpart in the context of elementary and secondary public schools. Amici believe that their public policy perspectives and litigation experiences provide an additional viewpoint on the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the First Circuit issued an *en banc* decision holding that noncompetitive elementary and secondary public schools may use race as the sole factor in assigning students to public schools without violating the Equal Protection Clause. In issuing its far-reaching decision, the court took it upon itself to extend the principles established in *Grutter*, 539 U.S. 306, for competitive law school admissions, into the setting of noncompetitive K-12 public schools. In doing so, the court calls into question the permissibility of considering race in this country's 94,000 K-12 public schools, which educate approximately 47.7 million students ranging from 5 to 18 years of age, and cost taxpayers about $401 billion a year.[3]

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[2] K-12 indicates kindergarten through 12th grade.

[3] Nat'l Ctr. for Educ. Statistics, *Information on Public Schools and*

(continued...)

There is more than a touch of irony in this case. By discounting the core concept of equal protection, public schools are sending the wrong message to our children—that racial discrimination is more important than individual rights and liberties in today's society. As the Fourth Circuit said:

> We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups.

Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000). The central question before this Court is whether the federal Constitution permits this result.

No decision from this Court sanctions racial balancing. *Grutter*, 539 U.S. at 330. After *Grutter*, lower courts are in disarray on whether racial balancing to achieve racial integration in noncompetitive K-12 public schools meets strict scrutiny. The Ninth and Sixth Circuits applied *Grutter*'s educational benefits in university admissions to K-12 student assignment plans. These Circuits found that the benefits this Court attributed to educational diversity were similar to those that can be found in racially integrated K-12 public schools. In contrast, prior to *Grutter*, the First and Fourth Circuits observed that whether racial diversity was a compelling governmental interest remained an open question.

Grutter's viewpoint diversity rationale cannot be extended to racial diversity in noncompetitive, compulsory K-12 public schools. Racial diversity in K-12 is based on the idea that a child's skin color determines how that child thinks and behaves,

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[3] (...continued)
School Districts in the United States, CCD Quick Facts, *at* http://nces.ed.gov/ccd/quickfacts.asp (last visited Oct. 17, 2005).

a practice denounced as racial stereotyping. *Grutter*, 539 U.S. at 328-29. The Lynn Plan demands nothing more than proportional representation by pigmentation to achieve the school district's preferred racial mix of students. This racial balancing is constitutionally forbidden.

Instead of racial balancing, school districts should focus their efforts to include students from a wide variety of backgrounds through race-neutral means. Such practices would ensure broad educational opportunities to all their students without regard to irrelevant characteristics such as race.

STATEMENT OF THE CASE

For the 2001-2002 school year, approximately 15,500 children were enrolled in Lynn, Massachusetts' K-12 public schools. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 7 (1st Cir. 2005). Far from revealing racially concentrated or racially isolated student bodies, each school has a diverse enrollment of minority and nonminority students ranging from 25% minority to 84% minority, reflecting Lynn's housing patterns.[4]

In 1989, Lynn implemented a voluntary desegregation plan that allows all students to attend neighborhood schools (the Lynn Plan). *Id.* at 7. Lynn encourages children to seek transfers to attend schools other than their neighborhood schools by setting up unique themes and programs at each school. *Id.* at 31 (Selya, J., dissenting). Race becomes a factor when a student seeks to transfer to another school. The transfer is permitted only if it will not increase the racial imbalance at either the sending or the receiving school. Under the Lynn

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[4] In the 2001-2002 school year, 42% of Lynn's students were "nonminority" or white and 58% were "minority" or nonwhite (15% black, 29% Hispanic, and 14% Asian). *Id.* at 7. Statistics of the Massachusetts Department of Education show that Lynn public schools would be racially diverse without the use of the Lynn Plan. *Available at* http://profiles.doe.mass.edu/home.asp?orgcode=01630000&view=enr (last visited Oct. 17, 2005).

Plan, a child classified as "white" may not receive a transfer if the school the child wishes to transfer from does not have "enough" "white" students. In contrast, a child classified as a "minority" may not receive a transfer if the school that child wishes to transfer into has "too many" "minority children."[5] *Comfort*, 418 F.3d at 8. The lower court provided the following example:

> Consider . . . two children, one white and one African-American, who are initially assigned to the same neighborhood elementary school for the 2001-02 school year. The school is racially isolated (i.e., less than 43% minority). Both children request a transfer to a nearby school that is racially imbalanced (i.e., greater than 73% minority). Under the Plan, the white student will be permitted to transfer, and the African-American student will not.

Id. The purpose of the discrimination is "to achieve the educational benefits of racial diversity" in the Lynn public schools. *Id.* at 5. Parents of children who were denied transfers filed a lawsuit claiming the Lynn Plan, among other things, violated their equal protection rights.

In a 3-2 decision, the lower court rejected the parents' claim by extending the analytic framework set out in this Court's recent higher education cases, *Grutter*, 539 U.S. 306, and *Gratz*, 539 U.S. 244, into the context of K-12 public schools. Although the court recognized that the law school plan in *Grutter* "focused on the advantages of viewpoint diversity in

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[5] A racially isolated elementary school is one where the percentage of minority students in the school falls 15% below or above the school district's overall minority composition in that school year. *Comfort*, 418 F.3d at 7. The Plan permits a 10% deviation for middle and high schools. *Id.* at 7. When a school falls within a percentage range, the school is classified as "neutral" or "racially balanced." *Id.* at 7.

the classroom," whereas "Lynn emphasizes the positive impact of racial diversity on student safety and attendance," these "differences do not negate a compelling interest in racial diversity in a K-12 setting." *Comfort*, 418 F.3d at 16. The court concluded that the school board had demonstrated a compelling interest in obtaining the benefits of a racially diverse student body in the K-12 setting. *Id.* at 16.

Turning to the "narrow tailoring" prong of strict scrutiny review, the court noted that this Court "has not yet considered a constitutional challenge to a voluntary race-based transfer policy for elementary and secondary schools." *Id.* at 17. Because the Lynn Plan concerns a transfer policy in K-12, the court ignored the *Grutter/Gratz* criteria relating to competitive admissions requirements in higher education. In rejecting the individualized consideration of applicants requirement, the lower court said: "The concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context that focuses on diversity along a number of axes (e.g., the *Gratz* and *Grutter* policies) are simply not present in a non-competitive K-12 transfer policy aimed at racial diversity." *Comfort*, 418 F.3d at 18.

Similarly, the court rejected the *Grutter* requirement that race was only one of many factors to be considered. There was "no reason to impose a blanket prohibition on the use of race as a *decisive* factor in a student transfer plan" to achieve racial diversity. *Comfort*, 418 F.3d at 19 (emphasis added). In addressing this Court's requirement that, "race conscious . . . policies must be limited in time," the court held that so long as Lynn does "periodic reviews to determine whether racial preferences are still necessary," the durational requirement is met. *Id.* at 22 (citation omitted).

The majority opinion generated a separate concurring opinion and a dissenting opinion. Both recognized the need for guidance from this Court. *Id.* at 27 (Boudin, C.J., concurring), *id.* at 29 (Selya, J., dissenting).

REASONS FOR GRANTING REVIEW

I

LOWER COURTS NEED GUIDANCE ON WHETHER RACIAL BALANCING TO ACHIEVE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS MEETS STRICT SCRUTINY REQUIREMENTS

The First Circuit stated that guidance from this Court is needed to resolve whether and to what degree a school district may use race in student assignments. The concurring opinion noted that using race as the touchstone for transfers may send "the wrong lesson for school boards to teach and students to absorb." 418 F.3d at 28 (Boudin, C.J. concurring). Judge Boudin's handwringing concurrence recognized:

> If we knew how the Supreme Court would decide the case before us, it would be right to adopt its answer in advance—whatever this court's members might prefer. But where the outcome in the Supreme Court is uncertain and past pronouncements were made in contexts different than the one now presented, the appellate court must exercise its own judgment on whether the local plan is constitutionally forbidden.

Id. at 28 (Boudin, C.J., concurring). The dissent noted:

> There is neither a Supreme Court decision squarely addressing whether racial diversity alone may constitute a compelling interest sufficient to justify the government's race-conscious preferences nor one addressing the narrow tailoring of racial classifications in voluntary, non-competitive school transfer plans.

Id. at 29 (Selya, J., dissenting).

The question of where and how one draws the line on the use of race in assigning children to K-12 public schools has been resolved in different ways by the lower courts.

In the *en banc*, 7-4 Ninth Circuit opinion in *Parents Involved in Cmty. Schools v. Seattle Sch. Dist., No. 1*, No. 01-35450, 2005 WL 2679585 (9th Cir. Oct. 20, 2005) (*en banc*) (*PICS*), the court examined a school district plan to promote racial diversity in high schools. *Id.* at *2. The "open choice" plan allows ninth grade students to apply for assignment to any high school in the district. *Id.* at *4-*5. Because the schools varied significantly in quality, five high schools became "oversubscribed"—i.e., more students want to attend the school than there are spaces. To solve the problem, the district used a series of tiebreakers to determine which students to admit to oversubscribed schools. The ultimate tiebreaker was race. If an oversubscribed school's population deviated from the overall racial makeup of Seattle's students (40% white and 60% nonwhite) by more than a set percentage point, the race of the student determined whether to grant the student's request. Parents filed a lawsuit claiming that the transfer plan violated the students equal protection rights.

PICS recognized that "[a]lthough the Supreme Court has never decided a case involving the consideration of race in a voluntary imposed school assignment plan intended to promote racial and ethnically diverse secondary schools," *id.* at *7, *Grutter* provided the necessary constitutional analysis for allowing racial preferences for nonremedial purposes.

> [I]t would be a perverse reading of the Equal Protection Clause that would allow a university . . . to use race when choosing its student body but not allow a public school district . . . to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies.

PICS, 2005 WL 2679585, at *9. Picking and choosing from *Grutter*'s hallmarks of narrow tailoring analysis, the Ninth Circuit found that the school district's racial tiebreaker program to be narrowly tailored. *PICS*, 2005 WL 2679585, at *13.

The majority opinion generated separate concurring and dissenting opinions. Judge Kozinski recognized that there is no decision from this Court squarely addressing whether racial diversity alone can constitute a compelling interest sufficient to justify government's race-conscious preference or one addressing narrow tailoring in voluntary noncompetitive K-12 public schools. Thus, the majority and dissent efforts in applying prior decisions from this Court were "unreal." "I hear the thud of square pegs being pounded into round holes. Ultimately, neither analysis seems entirely persuasive." *Id.* at *24 (Kozinski, J., concurring). However, Judge Kozinski then argued for a rational basis standard of review, giving deference to elected school officials beyond any deference warranted by this Court's opinions. *Id.* at *25.

The dissent found the program to be nothing more than "simple social balancing." *Id.* at *28 (Bea, C.J. dissenting). The dissent emphasized that "there is no *de minimis* exception to the Equal Protection Clause. Race discrimination is never a 'trifle.'" *Id.* at *29 (citation omitted). The dissent admonishes the majority for forgetting that "the Fourteenth Amendment protects individual rights, not the rights of certain races or groups." *Id.*

Like the Ninth Circuit, the Sixth Circuit applied *Grutter*'s compelling interest of student body diversity to a K-12 voluntary race-based student assignment plan. *McFarland v. Jefferson County Pub. Schools*, 416 F.3d 513 (6th Cir. 2005) (petition for rehearing and rehearing *en banc* pending). The Sixth Circuit issued a per curiam opinion affirming the district court's judgment. *McFarland v. Jefferson County Pub. Schools*, 330 F. Supp. 2d 834 (D. Ky. 2004). Although the district court noted that the "context of an elementary and

secondary school student assignment plan" was "slightly different" from the context of *Grutter*, *McFarland*, 330 F. Supp. 2d at 837, it found that the assignments implicated benefits that "are precisely those articulated and approved of in *Grutter*," *McFarland*, 330 F. Supp. 2d at 853. The *McFarland* court maintained that those benefits flowed specifically from the provision of "racially integrated public schools." *Id.*

Here, the First Circuit found the Lynn Plan to be narrowly tailored to the government's interest in obtaining the benefits of racial diversity. *Comfort*, 418 F.3d at 23. It declined to apply *Grutter*'s narrow tailoring requirements. "Unlike the *Gratz* and *Grutter* policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race." 418 F.3d at 18.

The Lynn Plan does not consider test scores, grades, letters of recommendation, or personal statements on how the individual student will contribute to student body diversity. The contrast with the Lynn Plan and the law school admissions plan could not be sharper. The Lynn Plan provides for none of the individualized consideration of the plan approved in *Grutter*, and it is even less flexible and more mechanical than the plan struck down in *Gratz*.

In contrast, prior to *Grutter*, three federal appellate court cases have held that nonremedial use of racial preferences in public schools violated the Equal Protection Clause. Those cases are *Wessmann v. Gittens*, 160 F.3d 790 (lst Cir. 1998); *Tuttle*, 195 F.3d 698, and *Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123 (4th Cir. 1999). Each case observed that whether racial diversity was a compelling governmental interest remained an open question.

In *Wessmann*, the First Circuit examined a race-based admissions policy at three "examination schools," where race was made a determining factor. As the *Wessmann* court stated: "The question of precisely what interests government may

legitimately invoke to justify race-based classifications is largely unsettled." *Wessmann*, 160 F.3d at 795. The First Circuit assumed, without deciding, that racial diversity may in some cases be a compelling interest sufficient to justify the use of racial preferences in making student assignments. *Id.* at 796. The First Circuit then rejected the schools' claim:

> The Policy is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden. Nor does the School Committee's reliance on alleviating underrepresentation advance its cause. Underrepresentation is merely racial balancing in disguise—another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.

Id. at 799 (citations omitted).

In *Tuttle*, 195 F.3d 698, the Fourth Circuit examined whether an oversubscribed public school may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body. The court stated that "[u]ntil the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental interest and proceed to examine whether the Policy is narrowly tailored to achieve diversity." *Id.* at 705.

In *Eisenberg*, 197 F.3d 123, the court addressed whether a school district may deny a student's request to transfer to a magnet school because of his race. The court stated: "*Tuttle* notes that whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved." *Id.* at 130.

Both the First Circuit in *Wessmann* and the Fourth Circuit were careful to point out that the type of racial diversity that

may be constitutional was different from racial balancing pursued for its own sake. Justice Powell described the type of diversity that may be deemed a compelling interest. As explained in *Wessmann*:

> "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." A single-minded focus on ethnic diversity "hinders rather than furthers attainment of genuine diversity."

Wessmann, 160 F.3d at 798 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., opinion)).

Applying this analysis, *Wessmann*, *Eisenberg*, and *Tuttle* held that the racial preferences at issue were not narrowly tailored to serve the potentially compelling interest of student body diversity. The Fourth Circuit in *Eisenberg* found:

> In fact, we find that it is mere racial balancing in a pure form, even at its inception . . . . The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing. As we have only recently held in *Tuttle*, "such nonremedial racial balancing is unconstitutional." . . . Although the transfer policy does not necessarily apply "hard and fast quotas," its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.

197 F.3d at 131 (citation and footnotes omitted).

As discussed above, *Wessmann*, *Eisenberg*, *Tuttle*, and *McFarland*, together with *Gratz*, *Grutter*, and *Bakke*, lead to the conclusion that narrowly tailoring a racial preference program at the K-12 level is impossible.

> It is challenging enough to determine what elements of "diversity" a young adult, who has had time to gain some modicum of life experience, might bring to a law school class. It would be absurd to presume the ability to make such a determination for students in the public K-12 setting. Instead of conducting a thorough examination of relevant individual characteristics, schools would likely resort to race as a proxy for "the diversity that furthers a compelling state interest which encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."

J. Kevin Jenkins, Ed.D., *Grutter, Diversity, and Public K-12 Schools*, 182 Educ. Law. Rep. 353, 368 (2004) (citation omitted).

This Court should grant the Petition for Writ of Certiorari to ensure that public schools provide educational opportunities to all their students without regard to irrelevant characteristics such as race.

II

THE DECISION BELOW MISCONSTRUED *GRUTTER*

This Court has never held that noncompetitive, compulsory K-12 public schools may voluntarily discriminate against children on the basis of race to achieve racial diversity. Nonetheless, the lower court extended the rationale in *Grutter* in an attempt to justify the use of racial discrimination against children. The lower court claimed that although there are differences between racial diversity and the viewpoint diversity approved in *Grutter*, they are merely "two sides of the same coin." *Comfort*, 418 F.3d at 14.

> There are, of course, some variances between the benefits sought. For example, the law school plan at issue in *Grutter* focused on the advantages of viewpoint diversity in the classroom, while Lynn emphasizes the positive impact of racial diversity on student safety and attendance. But it is natural that safety and attendance issues will loom larger in elementary and secondary schools than in graduate schools. Conversely, lively classroom discussion is a more central form of learning in law schools (which prefer the Socratic method) than in a K-12 setting. These differences do not negate a compelling interest in racial diversity in a K-12 setting. Instead, they are the logical result of context.

Id. at 16.

As this Court emphasized in *Grutter*, "[c]ontext matters when reviewing such [race-based] action." *Grutter*, 539 U.S. at 308. Thus, it is difficult to see how such differences between racial diversity and viewpoint diversity are not fatal to the lower court's analysis.

First, this Court granted *certiorari* in *Grutter* to resolve "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public *universities*." *Grutter*, 539 U.S. at 322 (emphasis added).[6] *Grutter* did not address whether racial diversity can be a compelling interest that justifies the use of race in K-12.

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[6] To emphasize that context is limited to public *universities*, this Court noted: "Compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that diversity is not a compelling state interest), with *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (holding that it is)." *Grutter*, 539 U.S. at 322.

Second, context is crucial. *Grutter*'s compelling interest analysis was expressly limited to the use of race in admissions in the context of "the expansive freedoms of speech and thought associated with the university environment . . . a special niche in our constitutional tradition." *Grutter*, 503 U.S. at 329; *accord Bakke*, 438 U.S. at 312 (Powell, J., opinion) (A university's First Amendment right to "[a]cademic freedom" includes "[t]he freedom of the university to make its own judgments as to education" and "the selection of its student body.").

Grutter's compelling state interest analysis simply has no counterpart in K-12 public schools. First, students in elementary and secondary schools have a right to admission. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Second, the educational mission of K-12 public schools is different from that of universities. The purpose of American public schools is to *teach* fundamental values necessary to maintain a democratic system. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). *See, e.g.*, Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 965 (2003) (Public school "[e]ducation is inculcation, not exposure."). K-12 public schools prepare students for citizenship, which includes teaching the principles of our Constitution. *Bethel Sch. Dist.*, 478 U.S. at 681. Such instruction necessarily includes less emphasis on the "robust exchange of ideas" in elementary and secondary school education. Joint Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 23 (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf (last visited Oct. 4, 2005).

At bottom, the Lynn Plan is nothing but a mechanism for racial balancing where the school district demands nothing

more than proportional representation by pigmentation to achieve the district's preferred racial mix of students. This Court should grant *certiorari* to clarify that the compelling state interest identified in *Grutter* does not apply to K-12 public schools.

III

REVIEW IS NECESSARY TO CLARIFY THAT RACIAL BALANCING TO PROMOTE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS OFFENDS THE EQUAL PROTECTION CLAUSE

The lower court held that the Lynn Plan's use of race to promote racial diversity does not violate the Equal Protection Clause. *Comfort*, 418 F.3d at 6. Under the Lynn Plan, race is the sole determinative factor in approving or denying a transfer request. Although the Equal Protection Clause permits some racial classifications under the most limited circumstances, it does not allow racial balancing for the sole purpose of achieving a specified "racial mix" of students that a school district believes is desirable. *Grutter* reaffirmed:

> Because the Fourteenth Amendment protects *persons*, not *groups*, all governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.

Grutter, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227) (internal quotation marks and citations omitted; emphasis in original). *See also Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

In *Adarand*, this Court reiterated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). This Court stated that free people "should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. This intolerance is necessary because government racial discrimination of any sort is inherently suspect, since racial characteristics are almost never an appropriate consideration for the government. *Id.* at 216.

> [T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," and subject to the "most rigid scrutiny," and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

Id. (citations omitted). This includes neutral policies that "burden or benefit the races equally." *Shaw v. Reno*, 509 U.S. 630, 651 (1993). Indeed, this Court rejected the notion that separate can ever be equal—or "neutral"—in *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), and refused to resurrect it in *Johnson v. California*, 125 S. Ct. 1141, 1143 (2005).

The lower court misses this point. The Lynn Plan is a mechanism to achieve a preferred racial mix of students. This is nothing more than "racial balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 330. As the dissent recognized:

> There is a harm inflicted on a student when her government denies her transfer for the *sole* or determinative reason of race—an immutable

> condition that she cannot change. That harm cannot be ignored simply because it serves what others (be they school committee members or my distinguished colleagues) perceive as a greater good.

Comfort, 418 F.3d at 31 (Selya, C.J., dissenting).

Race should play no determinative role in assigning students to noncompetitive, compulsory K-12 public schools. Unlike viewpoint diversity in the competitive admissions process of universities, racial diversity in K-12 contradicts, rather than furthers, the aims of equal protection. It is being used simply to achieve racial balancing. This Court should address the important national issue of whether the use of race to promote racial diversity in K-12 public schools violates the Equal Protection Clause.

IV

SCHOOL DISTRICTS REMAIN FREE TO ADDRESS RACIALLY IMBALANCED SCHOOLS THROUGH RACE-NEUTRAL MEANS

Although "narrow tailoring dictates that the government use race only when necessary to achieve a compelling interest," *Comfort*, 418 F.3d at 22, the court found that the school district need only "demonstrate a good faith effort to consider feasible race-neutral alternatives." *Id.* at 23.

School districts should not be allowed to rely on *Grutter* to shelter unconstitutional programs. Instead, they should ensure broad educational opportunities to all students without regard to irrelevant characteristics such as race.

> Perhaps in lieu of spending time and money on racial balancing schemes, public school officials could better use the resources trusted to their care by focusing on the problems that currently exist in many

> schools serving disadvantaged students. Addressing deficiencies in neighborhood schools would allow interested students the opportunity to prepare for higher education and to compete for admission on equal footing, without the accompanying stigma and resentment associated with racial preferences.

Jenkins, *supra*, at 369-70.

Moreover, there is nothing prohibiting school districts from addressing racially imbalanced schools through race-neutral means. The United States Department of Education, Office for Civil Rights identifies numerous "innovative 'race-neutral' alternatives" to encourage diversity "to ensure that their student bodies are accessible to people from a wide variety of backgrounds." Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004), *available at* http://www.ed.gov/about/offices/list/ocr/raceneutral.html (overview) and http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html (report) (last visited Oct. 25, 2005). Examples include:

- Providing preferences on the basis of socioeconomic status (SES). These plans seek to reduce concentrations of poverty. The use of SES would provide

> all students a chance to attend middle-class schools, in which a majority of students set the tone that academic achievement is to be valued and that aspirations should be set high, students learn from one another's differences, misbehavior is kept under control and does not become contagious, and teachers are not overwhelmed by large numbers of high-need students.

Id. at 34 (citation omitted).

- Creating many new "skills development" programs—projects designed to improve educational

achievement among students who attend traditionally low-performing schools.

- Low performing schools entering into partnership with universities to strengthen their students' ability to succeed in college.

Using race for the sole purpose of achieving racial diversity is prohibited by the Equal Protection Clause. Our children deserve to be treated as individuals, not as members of racial groups. This Court should grant *certiorari* to determine where and how one draws the line on the basis of race in noncompetitive compulsory K-12 public schools.

CONCLUSION

The decision of the First Circuit Court of Appeals upholding the use of race in noncompetitive elementary and secondary public schools conflicts with the decisions of this Court and of other courts of appeals interpreting the Fourteenth Amendment's Equal Protection Clause. The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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